



Supreme Court of the United States

OCTOBER TERM, 1945

No. 1161

SAFeway STORES, INCORPORATED, *Petitioner*,

v.

PAUL A. PORTER, Price Administrator

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I

OPINION BELOW

The opinion (R. 78) of the United States Emergency Court of Appeals was rendered on March 29, 1946, and is not yet reported.

II

JURISDICTION

The judgment of the Emergency Court was entered on March 29, 1946. (R. 81.) The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. Appx. § 924 (d).

11

III

STATEMENT OF THE CASE

A full statement of the case has been given under heading "A" of the Petition (pp. 1-6 herein) and it is incorporated here by reference.

IV

SPECIFICATION OF ERRORS

1. The Emergency Court erred in entering a judgment dismissing the complaint.
2. The Emergency Court erred in holding that petitioner is barred by principles of *res judicata* from questioning the propriety of Amendment 32 on the ground of discrimination or for any other reason.
3. The Emergency Court erred in failing to hold that the Administrator had presented no substantial basis for the issuance of Amendment 32.
4. The Emergency Court erred in holding that Amendment 32 was a binding and valid price regulation.
5. The Emergency Court erred in refusing to hold that Amendment 32 presented a grossly inequitable and discriminatory situation.
6. The Emergency Court erred in refusing to grant the relief requested.

V

QUESTIONS PRESENTED

The primary questions presented are—

- (1) Whether the Emergency Court of Appeals, may, by resorting to the rule of *res judicata*, refuse to review the

propriety of a new amendment to a Maximum Price Regulation, which amendment has necessarily never before been the subject of a protest as provided by the Price Control Act.

(2) Whether the refusal of the Emergency Court to consider petitioner's contentions in opposition to the statutory propriety of the new amendment (No. 32) to Maximum Price Regulation 422 deprives petitioner of the right of review and offends against the due process clause of the Fifth Amendment to the Constitution of the United States.

(3) Whether there must be a substantial basis for any action by the Administrator.

(4) Whether the Emergency Court may, prejudicially, impose a new requirement upon petitioner while not imposing it upon others.

VI

STATUTORY PROVISIONS

The provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App. § 901, et seq., insofar as pertinent to the questions here presented, follow:

"Sec. 2. (a) . . . the Price Administrator . . . may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purpose of this Act"

"Sec. 204. (a) . . . Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding:"

"(b) No such regulations, order, or price schedule shall be enjoined or set aside, in whole or in part,

unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. . . .”

Section 1 of the Stabilization Act of 1942, 56 Stat. 765, 50 U. S. C. Appx. § 961, is also applicable:

“In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities:”

VII

SUMMARY OF ARGUMENT

Point 1. The Emergency Court acted arbitrarily and capriciously in ruling that petitioner's objections to Amendment 32 were *res judicata*, such ruling being contrary to the principle established by this Court in *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214. The precise question presented here, namely, the propriety of Amendment 32, was not before the Emergency Court in any former case. Petitioner's objections to the amendment could not have been adjudicated until the institution of a protest proceeding after the amendment was issued. The instant case is the first and only one of that nature. The doctrine of *res judicata* cannot, therefore, apply.

Point 2. There was no substantial basis for the allowance of only 1½% as provided in Amendment 32. The Administrator, therefore, failed to meet the requirement of this Court as expressed in *Yakus v. United States*, 321 U. S. 414, 88 L. ed. 834. He did not even find that the amendment was generally fair and equitable, but only that it was tentative, based upon a preliminary study, and designed as a corrective measure until complete data could be obtained. Petitioner's showing that the 1½% allowance was grossly inequitable and discriminatory was ignored by the lower court, and petitioner's right of review was thereby denied in contravention of the statute and of the due process clause of the Fifth Amendment to the Constitution.

Point 3. The decision of the Emergency Court herein is in conflict with its decision in *Booth Fisheries Corporation v. Bowles*, 153 F. (2d) 449. A different rule is imposed upon petitioner to the prejudice of the latter. In order to effect an impartial and uniform administration of the Act this Court should establish an overall policy applicable to the treatment of retailers who perform pre-retail functions.

VII

ARGUMENT

Point 1. The Emergency Court of Appeals was arbitrary and capricious in refusing to consider petitioner's objections to Amendment 32, and its ruling that these objections were res judicata is in conflict with decisions of this Court.

The Emergency Court of Appeals was arbitrary and capricious in refusing to consider petitioner's objections to Amendment 32 to MPR 422. In effect, it denied petitioner its day in court.

This amendment was issued while a complaint filed by petitioner against a denial of a protest under MPR 422 was pending in the Emergency Court, but petitioner did not present its objections to the amendment in that proceeding. In fact, under the terms of the Act, petitioner could not have done so because those objections did not, obviously, appear in its protest. *Armour & Co. of Delaware v. Brown*, 137 F. (2d) 233.

Petitioner relied on the Administrator's statement that the provision for a 1½% allowance was "tentative" and that he proposed a "more detailed survey of the nature and costs of the prewarehousing function." It was not until it became apparent that the Administrator did not intend to make this survey and adjust the allowance that petitioner filed its protest to Amendment 32.

Petitioner's protest was timely. Under Section 203(a) of the Price Control Act, as amended, any person subject to a provision of a regulation or order may file a protest at any time after the issuance thereof. This section, as originally enacted, had provided that all protests (except those based solely on grounds arising after the expiration of 60 days) must be filed within 60 days after the issuance of a regulation or order. When the Act was amended in 1944, the new provision was substituted in order to protect the right of protest in cases such as the present.

Petitioner, therefore, did not lose its right to protest by waiting to see whether the expected adjustment of the allowance granted in Amendment 32 would be equitable. It was not until petitioner realized that the Administrator did not intend to make any such adjustment whatsoever that petitioner had cause to protest Amendment 32. See *United States Gypsum Co. v. Brown*, 137 F. (2d) 803, certiorari denied, 320 U. S. 799.

Then, for the first time, petitioner presented its objections to Amendment 32. Both the Administrator and

the Emergency Court refused to consider certain of these objections because petitioner had previously objected to MPR 422 *before this amendment had become effective.* Thus, petitioner was denied the right of a full hearing on its objections to this amendment.

The conclusion that these questions are *res judicata* is in conflict with decisions of this Court. In *Russell v. Place*, 94 U. S. 606, 607, 24 L. ed. 214, 215, this Court stated the rule:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that *the precise question was raised and determined in the former suit. . . .*" (Emphasis supplied.)

Accordingly, in *Oklahoma v. Texas*, 256 U. S. 70, 87, 65 L. ed. 831, 835, this Court, citing *Russell v. Place*, supra, pointed out that:

". . . in a subsequent suit upon a different cause of action, the question whether the matter decided on the former occasion was within the issues then proper to be decided, or was presented and actually determined in the course of deciding those issues, is open to inquiry, and that, unless it be answered in the affirmative, the matter is not *res judicata*."

The precise question presented herein—the propriety of Amendment 32—was not before the Emergency Court in the former case. The amendment was not even issued until after that case had been argued. Petitioner's objections were not, and could not have been, adjudicated at that time. Perforce, the Emergency Court did not determine whether the 1½% allowance provided by Amendment 32 is arbitrary, discriminatory, and/or inequitable.

It is thus apparent that petitioner's objections to Amendment 32 were not *res judicata* under the tests established by this Court. The refusal of the lower court to consider them in the present case was arbitrary and capricious. If this ruling be allowed to stand, the Administrator will be able, through the use of the delaying tactics practiced in the instant case, to limit a person's right to present fully his objections to regulations and obtain the judicial review provided by the Act.

Point 2. The mere assumption by the Emergency Court, without any substantial basis, that Amendment 32 is a valid price regulation, is contrary to the decisions of this Court, and its disregard for petitioner's evidence that the allowance provided was grossly inequitable and discriminatory makes a mockery of petitioner's right of appeal and offends against the due process clause of the Constitution.

This Court, in *Yakus v. United States*, 321 U. S. 414, 423, 88 L. ed. 834, 847, held that there must be a "substantial basis" for the Administrator's findings.⁵

During the course of a proceeding before the Emergency Court in which there was brought in question the failure of the Administrator to make available to petitioner an allowance for the performance of pre-warehousing functions, the Administrator issued Amendment 32 providing a 1½% allowance for certain such functions. This last-minute

⁵ This Court stated:

" . . . In short, the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting."

action on the part of the Administrator made moot the question of his previous failure but did not determine the propriety of the 1½% allowance.

In approving the issuance of the amendment, the Economic Stabilization Director stated that the 1½% allowance was "necessary to correct a gross inequity." (R. 47, 64.) This was the very same gross inequity of which petitioner had previously complained. But the allowance provided was not to be considered final. It was merely "designed as a corrective measure until complete economic data can be obtained"; it was based upon a "preliminary study". (R. 47.)

In his Statement of Considerations (R. 45) the Administrator made no explanation of the manner in which he arrived at the 1½% allowance. There was no basis, substantial or otherwise, for the allowance. The fact that it was characterized as only "tentative"—the result of a "preliminary study", showed that *basic facts were yet to be determined*.

In view of this tentative nature of the amendment it is not surprising that the Administrator made no finding that it was "generally fair and equitable" and would "effectuate the purposes of the Emergency Price Control Act". Such a finding was made in connection with Amendment 31 (R. 44-45), Amendment 44 (R. 51-53), Amendment 45 (R. 53-54), Amendment 46 (R. 54-55), Amendment 48 (R. 55-56), Amendment 51 (R. 57), Amendment 54 (R. 58), Amendment 55 (R. 58-59), and Amendment 61 (R. 59-60). But those amendments were not, as was Amendment 32, the result of a mere preliminary study, to be followed by a more detailed survey. They at least purported to have a substantial basis in fact as required by this Court.

Despite the complete failure of the Administrator to comply with the requirement of this Court as expressed in the *Yakus* case, the Emergency Court held that Amendment 32

is "a binding price regulation which is presumed to be valid unless and until the complainant establishes its invalidity by competent evidence." (R. 80.)

Petitioner has no way of knowing the basis for the Administrator's decision to provide the 1½% allowance other than that it was grossly inequitable to provide nothing. It may have been that the Administrator made only four or five inquiries within the trade and that someone suggested 1½% under a misapprehension of what it was to cover. Suffice it to say, there must have been very little basis for the particular percentage; otherwise, the Administrator would not have proposed a "more detailed survey". (R. 47.) Such a survey was never made. Nevertheless, the Emergency Court would give the tentative allowance the same sanctity as one having the "substantial basis" required by this Court.

Not only did the Administrator profess to correct a gross inequity, but he also claimed that the 1½% allowance placed integrated chain store organizations such as petitioner "in the same position with respect to ceiling prices as retailers who obtain their supplies at a later stage in the distribution process". (R. 45.) Thus he purported to remove certain *discrimination* which also existed.

Petitioner explained to the Emergency Court the reason why the situation, in spite of the 1½% allowance, was grossly inequitable and discriminatory. It showed how, in actual typical purchases of fresh fruits and vegetables in California, the allowances to others exceeded the allowance to petitioner and similarly situated chain store organizations for performing the same services by 782.3% to 1150% where the commodity was shipped to New York City, and by 1062.79% to 1900% where distribution was local.

The Emergency Court ignored petitioner's showing of this discriminatory and grossly inequitable condition which existed after the application of the 1½% allowance pursu-

ant to Amendment 32. It did this by applying the rule of *res judicata* and referring to a record made *before* the issuance of the amendment. The Court held that, in any event, the amendment was assumed to be valid in the absence of any affirmative showing that the allowance was "so inadequate as to render the regulation not generally fair and equitable", and regardless of the fact that the Administrator made no pretense of showing a "substantial basis" therefor. (R. 80.)

The action of the Emergency Court, therefore, not only sanctions the Administrator's disregard for the requirement laid down by this Court in the *Yakus* case, but it also deprives petitioner of its right of appeal, which is part of the "authorized procedure" provided by the Price Control Act. Such procedure is inherent in due process, and its denial offends against the due process clause of the Fifth Amendment to the Constitution.⁶

Point 3. The refusal of the Emergency Court of Appeals to allow petitioner an adequate markup for prewarehousing functions is in conflict with its decision in *Booth Fisheries Corporation v. Bowles*.

By refusing to review petitioner's objections to Amendment 32, the Emergency Court, in effect, upheld a regulation

⁶ This Court stated in the *Yakus* case (321 U. S. 434, 88 L. ed. 853):

"For the purposes of this case, in passing upon the sufficiency of the procedure upon protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. *Action taken by them is reviewable in this Court and if contrary to due process will be corrected here.* . . . But upon a full examination of the provisions of the statute it is evident that the authorized procedure is *not incapable* of according the protection to petitioners' rights required by due process." (Emphasis supplied.)

which failed to place petitioner and other direct-buying retailers who perform pre-retail functions in the same position with respect to ceiling prices as other Group 3 and Group 4 retailers who obtain their supplies at a later stage in the distribution process.

On the other hand, in *Booth Fisheries Corporation v. Bowles*, 153 F. (2d) 449, the Emergency Court held that MPR 579 was discriminatory in its application to a wholesaler of fresh and frozen fish insofar as it prohibited the wholesaler, who functioned as a producer, wholesaler, primary distributor and retailer, from taking any markup, other than a processor's, on frozen fish and thus prevented it from charging the level of prices permitted to a competing independent inland wholesaler. The Court pointed out that under this regulation an independent inland wholesaler which procured its frozen fish from a primary distributor or inland warehouse of a processor might charge a higher price than an inland branch organization of the complainant wholesaler which functioned in exactly the same way as the inland wholesaler and procured its frozen fish in an identical fashion. The court stated (p. 451) that—

". . . a regulation must be held to be arbitrary and capricious if its provisions are such that all persons who are similarly situated are not dealt with upon an equal basis but greater burdens are laid upon one than are laid upon others in the same calling and condition. . . ."

Thus, the Emergency Court, in deciding these two cases involving similar questions, reached conflicting results.

The question presented in these cases is an important one in the administration of the Act. A final determination of this question is necessary to secure a uniform and impartial policy. This Court should grant certiorari in the present case and resolve this conflict by establishing an

overall policy on the markups to be allowed sellers who perform other functions.

IX

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that the Emergency Court of Appeals may be brought into line with the decisions of this Court and that the review provisions of the Emergency Price Control Act may be given the effect intended by Congress and required by the Constitution; and that to such end a writ of certiorari should be granted, and that this Court should review the judgment of the United States Emergency Court of Appeals and finally reverse it.

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Petitioner.

April 27, 1946.

(4389)